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No. 00-347

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; and STEPHEN NG, a Hong Kong citizen,

Petitioners,

v.

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation; and UIH ASIA INVESTMENT CO., a Colorado general partnership,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

PAUL M. DODYK
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

Scott R. Bauer
PETRIE, BAUER, VRIESMAN & HECHT, LLP
1775 Sherman Street, Suite 2500
Denver, CO 80203
Telephone: (303) 226-7700
Facsimile: (303) 226-7777

William R. Jentes
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
Telephone: (312) 861-2000
Facsimile: (312) 861-2200

October 11, 2000

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CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The corporate disclosure statement at p. ii of Petitioners' Petition for Writ of Certiorari dated September 5, 2000 is still accurate.

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INTRODUCTION

Respondent United International Holdings, Inc. ("UIH") concedes all of the essential facts upon which Wharf's petition for certiorari is based. Those essential facts are that the courts below imposed a judgment of $153,708,440 on the basis of an alleged oral utterance and an asserted economic loss of approximately $1,000,000. UIH concedes that the only wrong alleged is that a representative of Wharf orally offered UIH an option to purchase 10% of the stock of a cable television system ("Wharf Cable") being organized by Wharf in Hong Kong for $50,000,000± , and that Wharf did not intend to perform that alleged contractual obligation.

UIH does not claim that Wharf made any misrepresentations about the *value* of the stock of Wharf Cable or any other misrepresentation independent of Wharf's allegedly fraudulent undertaking to sell UIH 10% of the stock of Wharf Cable. UIH does not deny that under the terms of its alleged option, UIH was obligated to pay $50,000,000± to purchase 10% of the stock of Wharf Cable. UIH does not claim that it ever exercised the option or paid the exercise price of $50,000,000±. UIH does not challenge the fact that its expenditures in alleged reliance upon that option were approximately $1,000,000. UIH does not deny that most of the parties' negotiations occurred in Hong Kong, that the services UIH was to render would be performed in Hong Kong, or that both Wharf and UIH intended their commercial relations to be governed by Hong Kong law.

UIH does not deny that UIH's expert's testimony was a valuation of the value of 10% of the *stock* of Wharf Cable — not a valuation of an *option* to purchase that stock for $50,000,000. UIH's expert's opinion, therefore, necessarily overstates the value of UIH's alleged option by approximately $50,000,000. (*See* P.App., X-4-14) These essential facts justify the granting of certiorari in this case.

These facts justify the granting of certiorari because these facts establish that:

(1) UIH had no claim under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), or SEC Rule 10b-5, 17 C.F.R. § 240.10b-5;

(2) Hong Kong law, not United States law, was applicable to the parties' relationships;

(3) the district court had no subject matter jurisdiction; and

(4) the district court's damage award exceeds applicable constitutional limitations by at least $100,000,000.

I. UIH's complaint fails, as a matter of law, to state a violation of Section 10(b) of the Securities Exchange Act of 1934 or SEC Rule 10b-5 because claims that a defendant misrepresented its intention to sell securities do not state a violation of these provisions.

UIH admits that the only misrepresentations of which it complains are those implicit in Wharf's alleged granting of an "option" to purchase 10% of the stock of Wharf Cable for $50,000,000±, coupled with Wharf's intention not to perform that alleged contractual obligation. UIH does not claim that Wharf made any misrepresentation about the value of Wharf Cable. UIH does not claim that Wharf made any misrepresentation independent of its allegedly fraudulent promise to perform an alleged contractual obligation.

That means that UIH did not allege or prove a violation of Section 10(b) of the Securities Exchange Act of 1934. UIH's allegation fails to state a violation of Section 10(b) because that section does not apply to alleged misrepresentations of a defendant's intention to sell securities. The Securities Acts of 1933 and 1934 have as their "fundamental purpose . . . implementing a philosophy of full disclosure" of all facts bearing on the value of securities, and were not intended to federalize "cause[s] of action . . . traditionally relegated to state law", such as the dispute over UIH's alleged entitlement to

purchase stock in Wharf Cable in this case. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478 (1977).

Since this Court's decisions in *Santa Fe* and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), all Circuit Courts of Appeal, except the court below, have held that complaints alleging the misrepresentation of a defendant's intention to sell a corporate security do not state a violation of Section 10(b). That was the holding in each of *Gurwara v. LyphoMed, Inc.*, 937 F.2d 380 (7th Cir. 1991); *Hunt v. Robinson*, 852 F.2d 786 (4th Cir. 1988); *Stanford v. Humphrey*, No. 88-3997, 1990 WL 4659 (9th Cir. Jan. 25, 1990) (unpub.); and *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976).[1]

Contrary to UIH's misleading assertion that three of these cases involved only alleged breaches of contract (Opp., 11-12), the plaintiffs in each of these cases alleged fraud and the Court of Appeals held in each case that Section 10(b) did not apply to alleged misrepresentations of a party's intention to sell securities. In three of these cases, the Court of Appeals held that the complaint failed because it did not allege a misrepresentation relating to the value of the corporate security. In *Gurwara*, the Seventh Circuit held that plaintiff's allegation "in no way related to the value of that stock". 937 F.2d at 382. In *Hunt*, the Fourth Circuit held that "[p]laintiff . . . has alleged no

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[1] None of the post *Blue Chip* Court of Appeals cases cited by UIH in its Brief in Opposition ("Opp.") held that a party's alleged misrepresentation of its intention to sell securities constitutes a Rule 10b-5 violation. (Opp., 12) *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986), involved garden variety financial misrepresentation. *Threadgill v. Black*, 730 F.2d 810 (D.C. Cir. 1984), is a cryptic per curiam opinion reversing a district court decision that a partially executed contract of sale is not a "contract to sell" securities under the Securities Exchange Act. *In re Phillips Petroleum Securities Litigation*, 881 F.2d 1236 (3d Cir. 1989), involved alleged manipulative practices in a tender offer; *S.E.C. v. Jakubowski*, 150 F.3d 675 (7th Cir. 1998), involved the misappropriation of securities in violation of O.T.S. regulations; and *Richardson v. MacArthur*, 451 F.2d 35 (10th Cir. 1971), was decided before *Blue Chip Stamps*.

misrepresentation of the value of the stock . . . ." 852 F.2d at 787. In *Stanford*, the Ninth Circuit held that "the alleged fraud in this case is in no way related to the value of the security". 1990 WL 4659, at *1. In *Tully*, the Third Circuit likewise held that plaintiffs' complaint that they had been fraudulently deprived of their entitlement to purchase stock did not state a Section 10(b) violation, but did so by holding that the fraud complained of did not occur in connection with the sale of a security because the defendants in that case, as the defendants in this case, had not sold securities to the plaintiffs. 540 F.2d at 194.

The decision below is, therefore, in undeniable conflict with the decisions of the Third, Fourth, Seventh and Ninth Circuit Courts of Appeal, each of which has held that claims of fraud based on misrepresentations related to a party's claim of entitlement to purchase stock do not state a violation of Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5.

II. UIH's complaint fails, as a matter of law, to state a violation of Section 10(b) or SEC Rule 10b-5 because UIH's alleged oral option was not a "contract to sell" within the meaning of the Securities Exchange Act of 1934.

This Court should grant certiorari to correct the Tenth Circuit's erroneous ruling that UIH's alleged oral option constitutes a "contract to sell" a security under 15 U.S.C. § 78c(a)(14), the existence of which is a prerequisite to the maintenance of a Section 10(b) action. That ruling is in conflict with the opinions of the Seventh Circuit in *Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690 (7th Cir. 1990), and the Eleventh Circuit in *Pelletier v. Stuart-James Co.*, 863 F.2d 1550 (11th Cir. 1989); both of which held that this Court's decision in *Blue Chip Stamps*, *supra*, requires that a Section 10(b) plaintiff have, at minimum, an enforceable right to purchase securities.

As Judge Easterbrook said in *Kagan*:

> "It is easy to say that there was an oral agreement. Section 8-319 of the U.C.C. increases certainty in commercial life by preventing the enforcement of oral agreements to purchase or sell securities. . . . The principles animating § 8-319 and the doctrine of *Blue Chip Stamps* alike require a conclusion that an unenforceable oral agreement is not a 'contract' to purchase or sell securities". 907 F.2d at 691.

Contrary to UIH's argument (Opp., 11, 13), the question whether UIH's alleged oral option constitutes a "contract to sell" securities within the meaning of § 78c(a)(14) of the Securities Exchange Act of 1934 is a question of federal law, as to which the opinion below conflicts with those of the Seventh and Eleventh Circuits in *Kagan* and *Pelletier*. That federal question encompasses the conflicting decisions of the Seventh, Tenth and Eleventh Circuits as to the application of § 8-319 of the Uniform Commercial Code insofar as it determines the meaning of 15 U.S.C. § 78c(a)(14).

The court below made three separate mistakes in construing 15 U.S.C. § 78c(a)(14). *First*, it ruled that UIH's oral option, itself, constituted a security, the acquisition of which sufficed to constitute the purchase of a security for purposes of the Securities Exchange Act of 1934. That decision is flatly inconsistent with: (1) the opinions of the Seventh and Eleventh Circuits in *Kagan* and *Pelletier*, both of which held that alleged oral rights to purchase a security do not satisfy the statutory requirement that a Section 10(b) plaintiff must allege a "contract to sell" securities, and (2) this Court's opinion in *Blue Chip Stamps*, which eschewed reliance on alleged oral assertions as a sufficient predicate for Section 10(b) actions.

Second, the court below erred in holding that the federally incorporated version of U.C.C. § 8-319 did not apply to UIH's allegations of an oral option to purchase securities because UIH's alleged oral option is not a "security" within the meaning of the phrase "contract for the sale of securities" in U.C.C.

§ 8-319. The court erred because the "security" in question for purposes of applying U.C.C. § 8-319 is plainly the stock of Wharf Cable, not the alleged option, which is, equally plainly, the "contract" which U.C.C. § 8-319 renders unenforceable.

Third, the court below erred in excusing the district court's error in failing to submit the statute of frauds/partial performance question to the jury on the grounds that the court's contract consideration instruction was sufficient. The district court's boiler-plate contract consideration instruction did not require the jury to make the findings necessary to satisfy the far more stringent conditions of the statute of frauds. (*See* Pet., 20) Indeed, the jury could not have made the findings of fact necessary to avoid the statute of frauds because partial performance rendered in reliance upon a conditional promise is unreasonable as a matter of law. *See, e.g., Nelson v. Elway*, 908 P.2d 102, 110-11 (Colo. 1995) (en banc), and Wharf's promise, even as alleged by UIH, was conditional. (P.App., M-11-12) Together, those erroneous rulings of federal law have created the exact situation which this Court sought to avoid in *Blue Chip Stamps*, a situation in which "an action under Rule 10b-5 . . . turn[s] largely on which oral version of a series of occurrences the jury . . . decide[s] to credit . . . ." 421 U.S. at 742.

III. This Court should grant certiorari to eliminate the damage inflicted by the courts below on the certainty of international commercial transactions by the courts' avoidance of the threshold choice-of-law question.

This Court should grant certiorari to protect the ability of parties to international transactions to specify the law applicable to their relations — an ability which this Court has recognized to be an "indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Such review is particularly warranted in a case such as this where the WWF style of contemporary U.S. litigation has resulted in so extreme and unpredictable a jury

verdict. UIH does not seriously challenge the fact that Hong Kong law was applicable to this case by reason of the parties' intentions and geography. (*See* Pet., 22-23)

Rather, UIH takes refuge behind the Tenth Circuit's avoidance techniques; namely, that no choice-of-law decision was necessary: (1) because Wharf had allegedly failed to demonstrate any difference in the substantive content of Hong Kong and United States securities laws; and (2) because Wharf had failed to prove that the parties had embodied their choice of law decision in a written instrument.

Neither position is tenable. *First*, where the district court's very subject matter jurisdiction is dependent on the choice-of-law question, that decision must be made at the outset of the litigation if the teaching of *Alberto-Culver* is to have any practical significance, whatever the substantive content of that law. *Second*, to require that a party defending against allegations of *oral* obligation prove its choice-of-law defense by reference to a *written* executed contract borders on the absurd. The Tenth Circuit's avoidance techniques raise serious issues affecting international commerce worthy of this Court's review.

IV. This Court should vacate the district court's judgment as to all causes of action.

This Court should vacate the district court judgment as to all causes of action because: (1) the district court lacked subject matter jurisdiction; (2) plaintiffs' state court judgments were barred by three separate lines of applicable authority which the Tenth Circuit unjustifiably refused to apply; (*see* Pet., 13-14); and (3) plaintiffs' excessive $153,708,440 judgment is unconstitutional as to any cause of action under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

In *Tully v. Mott Supermarkets, Inc.*, discussed above, the facts of which are strikingly similar, the Third Circuit Court of Appeals reversed the district court's judgment as to pendent state claims after adjudication on the merits, holding:

> "If it appears that the federal claim is subject to dismissal under F. R. Civ. P. 12(b)(6) or could be disposed on a motion for summary judgment . . . then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances." 540 F.2d at 196.

Because UIH's claim should have been dismissed at the outset on a Rule 12(b)(1) or 12(b)(6) motion, the district court should have dismissed UIH's entire complaint. As the Third Circuit Court of Appeals held in *Tully*, the fact that the district court erroneously adjudicated the merits of the state claim is *not* a reason to preserve the judgment. See also *Hunt v. Robinson*, discussed above, where the Fourth Circuit similarly affirmed the dismissal of plaintiff's inadequate Section 10(b) allegations on subject matter jurisdiction grounds. 852 F.2d at 786-88. UIH's argument that Wharf's argument is foreclosed by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) is baseless. *Steel Co.* did not even address the issue raised here, *i.e.*, the dismissability of pendent state claims where a district court lacks subject matter jurisdiction.

V. This Court should grant certiorari to vacate the imposition of a judgment of $153,708,440 which has as its sole basis an oral promissory utterance and an alleged economic loss of no more than $1,000,000.

The most important reason for this Court's review is to correct the manifest injustice inflicted by a verdict which is so grotesquely excessive in light of the conduct of the parties and the economic interests involved. UIH has effectively, if unwittingly, conceded the excessiveness of the verdict. UIH does not deny that its expert valued a 10% stock interest in Wharf Cable, rather than UIH's alleged option to acquire that stock interest for $50,000,000. UIH could not credibly make any such denial. UIH's expert report, which appears as Appendix X to the Petition, is clearly and unquestionably a valuation of the stock of Wharf Cable. UIH's expert repeatedly described his study as "valuations of Wharf's cable television system in Hong Kong" as "determining the value of the cable

television system in Hong Kong", and as "discounted cash flow valuations for the system." (P.App., X-4, X-6) On cross-examination, UIH's expert admitted: "I valued a ten per cent economic interest of CNCL [the company owning Wharf Cable]". He was asked: "You valued — what you did was to value a ten per cent ownership interest in the cable company, right?" He answered: "Yes". (P.App., AF-3, AF-4)

UIH's expert performed a conventional discounted cash flow ("DCF") analysis of the value of Wharf Cable. (P.App., X-6) In a DCF analysis, all of the business revenues and all of the business costs — current and capital — are estimated. The costs are subtracted from the revenues year by year and the resulting income stream is discounted to present value. The fact that this analysis of the value of the stock of Wharf Cable deducts capital expenditures does not alter the fact that the value estimated — the $67,000,000 — is a valuation of the stock of Wharf Cable.

It is, therefore, not a valuation of UIH's alleged option to purchase that stock interest in Wharf Cable for $50,000,000±. That option right is obviously worth about $50,000,000 less. UIH's statement that "[o]n the evidence in this case, if Wharf had not committed fraud and breach of contract, UIH would have been $67,000,000 richer" is a brazen misrepresentation. (Opp., 18, n.6) The $67,000,000 is a valuation of 10% of the stock of Wharf Cable; not a valuation of UIH's alleged option to acquire 10% of the stock of Wharf Cable, which was burdened by its obligation to pay (or invest) $50,000,000. No reputable investment banker would give any credence to UIH's attempt to confuse the result of UIH's expert's analysis with a valuation of UIH's alleged option.

Sensing the weakness of its position on the sufficiency of its damage evidence, UIH tucks its substantive argument into a footnote and seeks to deprive Wharf of appellate review by misdescribing the record and ignoring that fact that Wharf repeatedly attacked UIH's expert testimony as failing to provide any evidence of the value of the option. Wharf's counsel

repeatedly pressed UIH's expert to admit that he had not valued UIH's alleged option. (P.App., AF-3-5) Wharf's counsel stressed UIH's failure to value UIH's alleged option in his closing argument. (P.App., AV-1, AW-1) Wharf reiterated its objections in its post-trial motions. (P.App., J-5-6; K-15-17). That record leaves no doubt that the district court judge was made fully aware of the insufficiency of UIH's damage evidence. No more can reasonably be required.

The only other evidence which UIH provided of its damages were expenditures made in reliance upon its alleged option which approximated $1,000,000 (P.App., L-45; AX-1; AY-1). That means that the decisions below leave this Court with a judgment of $153,708,440, including $58,500,000 in explicit punitive damages, in a case based on an alleged false promissory utterance and a proven economic loss of no more than a million dollars. Wharf respectfully submits that that judgment is so manifestly excessive as to warrant review under *BMW of North America, Inc. v. Gore, supra.*

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to review the decision of the Tenth Circuit Court of Appeals.

October 11, 2000

PAUL M. DODYK
Counsel of Record

CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000

Scott R. Bauer
PETRIE, BAUER, VRIESMAN
& HECHT, LLP
1775 Sherman Street,
Suite 2500
Denver, CO 80203

William R. Jentes
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601

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APPENDIX AV

EXCERPT FROM DEFENDANTS' CLOSING ARGUMENT (APLT. APP. 10254-10256; 8035:06-8037-24)

Excerpt from Defendants' Closing Argument

(Aplt. App. 10254-10256; 8035:06-8037-24)

[Mr. Munson:]

In any event, when we look at damages here and if you get to the issue of damages in the case which, of course, you don't have to if you don't find any liability, but if you reach damages, there are really three key issues to address. They are first, what, if any, dollar value is there to the alleged option in this case? That's Issue No. 1. Issue No. 2 is what's the actual extent of the work that UIH did on the project? Then, third, in light of those two, what, if any, compensation should there be to UIH?

Now, what I'd like to do is to start with No. 1, the dollar value of the alleged option. I have a board here entitled Dollar Value of Alleged Option Is Minimal. Then, there are five points under that and what I'd like to do is to just go through those one at a time and talk about what the evidence is and what the facts have shown in the case and review the documents that are related to it.

On the first point, this is a very important point. Plaintiffs' complaint alleges only an option to buy 10 per cent of Wharf Cable. That's what the complaint alleges; only an option to buy 10 percent of Wharf Cable. Now, we know from the testimony from Mr. Carey that an option to buy something is different than ownership. And, when there's an option, there are a whole bunch of other certainties between the fact of the option and the fact of the ownership. What we know in this case is that there's only one person who valued the option that's claimed in this case. That's Mr. Carey. There is not any plaintiff witness, at all, who actually valued the option that's claimed in this case in the amended complaint in Paragraph 54. That's Point No. 1. Plaintiffs' complaint alleges only an option and it was only Mr. Carey who valued it.

Secondly, Mr. Carey valued the option in a simple, logical, and I would say common sense way. Let's look at the chart that

was prepared when Mr. Carey testified. You might remember that I wrote this out in hand and what I did was I had it typed up so it would be a little bit easier to read in this context. And, what we know is—and, there's been talk in this case in the closing arguments about using common sense. I think it's very important for all of us to understand that even in complicated situations like this case and the issues here, applying our own common sense, everyday common sense, and experience is often the best way to resolve these problems. And, I think when Mr. Carey was valuing the option, he applied a very simple, logical, common sense approach.

What he said was that you do three things at the outset. First, you identify the terms of the option; second, you identify the risks of the option; and third, you look at the value of the underlying asset, if it's necessary, to get there. And then, he went on to value the option.

Now, let's look at what it is that Mr. Carey did in light of that. What he did was he identified—this is No. 3. He identified the clear, important business risks, each of which reduced the value of the option. What were those risks of the option? And, you recall the allegation in the complaint is that as of October 8, 1992, an oral option was granted by Wharf to UIH. Those are the allegations.

So, the first thing to do is to look at what the circumstances were in the real world about that alleged option when it was supposedly granted. What were the uncertainties? The first uncertainty was—and there's absolutely no debate about this—that nobody knew then whether Wharf would win the license. In fact, the application to the license had only been filed on September 30. So, this meeting when the alleged option was granted was only eight days later. So, there's just no dispute that a major uncertainty that goes to the value of this option was whether the license would be granted or not. That's number one.

APPENDIX AW

EXCERPT FROM DEFENDANTS' CLOSING ARGUMENT (APLT. APP. 10271-10273; 8052:14-8054:19)

Excerpt from Defendants' Closing Argument

(Aplt. App. 10271-10273; 8052:14-8054:19)

[Mr. Munson:]

So, let's look at what happened here. Mr. Carey identified these risks and then because of the risks and uncertainties, he valued the option. And, the risks again, just to remind ourselves, that existed in the option were whether there be a license, whether UIH could raise the money, whether UIH's standard for making the investment would be met, and fourth, whether a shareholder's agreement would ever be signed, at all, including these important minority and liquidity issues.

So, what did Mr. Carey conclude at the end of the road on this and let's put back up 1752 if you've got it there. Now, what Mr. Carey did was he looked at the terms of the option, he identified the risks that we just talked about, then he concluded that he didn't need to do #3 because he was able based on what he had seen on #1 and 2 to value the option. And, he valued it as of October 8, 1992 and concluded for all of those risk reasons that they value of the option was minimal. Then, he valued it as of April 1, 1994 when almost many of the same risks still existed, the really important risks still existed; no shareholder's agreement, no minority protections, and no liquidity issues resolved, as well as the problems with UIH's internal rate of return. I asked him if he could put a dollar value on it. He said less than a million.

And then, returning back to where we began, I asked him if he reviewed the valuation that UIH had done in valuating the option. Of course, what we know is that neither Mr. Jones nor Mr. Bowles nor anyone else from UIH valued this option as an option, at all. That's what their testimony was. Now, let's ask ourselves for a moment why is that? Why didn't they value this? Why didn't they value this option? They didn't value the option because, I believe, they know the value of the option, if you looked just at the value of the option alone, that the value of the option is minimal and they don't want to have to reach

that conclusion. Now, why is the value of the option minimal? Again, it's because of these risks, these business risks that we talked about here, that UIH because they didn't value an option, they didn't have to look at to determine. So, at the end of the road, because of the risks and uncertainties, the value of the option taken as an option is minimal, less than the million dollars.

Okay. Let's turn next to the next topic and that is the dollar value of an alleged 10 per cent ownership. Now, I don't think—we have to remind ourselves that again the complaint here alleges an oral option of 10 per cent. That's what the complaint is. The complaint alleges that that's what UIH didn't get was option for 10 per cent. That's the only thing that's properly at issue here is the value of this alleged option for 10 per cent. So, I don't think one needs to even really consider what a 10 per cent ownership valuation would be, at all, because I don't think that's what's at issue in the case. But, if you look at it separately and independently, as we had Mr. Carey do, we still get to the same result. That is the value is still minimal.

EXCERPT FROM
DIRECT EXAMINATION OF W. CAREY
(APLT. APP. 9163-9165; 6944:11-6946:21)

Excerpt from Direct Examination of W. Carey

(Aplt. App. 9163-9165; 6944:11-6946:21)

Direct Examination By Mr. Munson Resumes:

Q Mr. Carey, on the option valuation, just before we leave this, a couple last questions. To do this option valuation, you went through the first step of identifying in terms of the option; correct;

A Yes.

Q And, the second step, identifying the risks; is that right?

A Right.

Q And, you didn't do the third step, correct?

A Did not. Well —

Q As you were valuating the option?

A Are you talking about as a chronological matter and how I actually did the work?

Q What you did to value the option itself?

A Well, let me put it this way. It's not necessary to get to the value of the asset in this case in order to value that option.

Q Okay. So, you got to the value of the option down here at the bottom where you had—as of these two dates, your opinion is the option is of minimal value; is that correct?

A Right.

Q What do you mean by minimal value?

A By minimal, I mean just that. I mean, it's minimal in comparison to the value Mr. Jones has calculated. I guess, if you're looking for something more specific than that, I would say something less than a million dollars just based upon what UIH put into the deal in terms of services it allegedly provided Wharf.

Q Okay. Let's change topics here and talk if we can about the value of the alleged 10 per cent ownership in the business.

A Right.

Q Okay. And, I'm going to call this, if I may, 10 per cent of business valuation. Is that okay?

A Call it value of 10 per cent of the business.

Q Okay, I'll do that. Okay. What I wanted to do at the outset was just to talk briefly about what the steps are that you used to value the 10 per cent of the business. So, without going into them in great detail, I'd just like to sort of summarize them here and then we can come back and go through them in some more detail.

MR. CHASE: Your Honor, I'm going to object. There's no opinion by this witness in this case in a report or otherwise that's even close to valuing 10 per cent of the business. He's never given an opinion on this that we're aware of.

MR. MUNSON: Excuse me for a moment, Your Honor.

(Pause.)

MR. MUNSON: Your Honor, the specific testimony is that—I'm anticipating some of the testimony that the witness will give on that, but what he will do is he will talk about discount rates that were used by Mr. Jones and how they were too low in his opinion, and thus, the value of the ownership interest was too high. It's really that relationship between the discount rate and the value that his testimony goes to here.

THE COURT: What he's doing is rebutting the testimony of Mr. Jones; is that what you're saying?

MR. MUNSON: Exactly. Correct, Your Honor.

THE COURT: All right. The objection is overruled. He's permitted to do that.

APPENDIX AY

STIPULATION OF PARTIES REGARDING EXPENSES INCURRED BY PLAINTIFFS, DATED MARCH 14, 1997

AY-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-K-2560

UNITED INTERNATIONAL HOLDINGS, INC., et al.,

Plaintiffs,

v.

THE WHARF (HOLDINGS) LIMITED, et al.,

Defendants.

STIPULATION

In lieu of plaintiffs calling Valerie Cover of UIH to testify in their case in chief, the parties stipulate as follows:

1. Defendants have no objection to the admission of Exhibit 1612.

2. Plaintiffs incurred a total of approximately $1.01 million in salary and benefits and other expenses in connection with the Hong Kong project from April 1991 through March 18, 1994. Of the total amount, over $475,000 is attributable to salary and benefit costs of persons who worked in connection with the project and the remainder is attributable to their expenses. The expenses have been prorated based on the percentage of the employee's time allocated to the Hong Kong project, as reflected on the employee's time sheets. Plaintiffs incurred over $900,000 of the total amount during the period from June 1992 through March 18, 1994.

3. These amounts do not include salary and benefit costs for administrative personnel or other overhead costs.

4. Exhibit 1453 reflects a portion of salary cost that was allocated to the Hong Kong project for the persons who are listed on that exhibit, but omits other persons who worked on the project.

5. As of March 1994 (except where otherwise noted), the following UIH personnel listed on Exhibit 1612 earned the following bi-weekly salaries (not included benefits):

Mark Booth	$9230.76
Paul Case	$10,000 (monthly retainer)
Ashley Dartnell	$8461.54
David D'Ottavio	$9807.64
Mike Fries	$6923.06
Bill Hudon	$7846.15
Pat McDonough	$3311.54
Warren Mobley	$5600.00
Steve Moss	$2307.69 (as of 3-93)
Sonjia Norman	$2363.40
Simon Sutton	$2313.82
Bill Pittman	$5769.23 (as of 8-93)
Blake Williams	$3076.92 (as of 3-93)

Respectfully submitted this 14th day of March 1997,

HOLME ROBERTS & OWEN LLP
David B. Wilson

/s/ David B. Wilson
1700 Lincoln, Suite 4100
Denver, CO 80203
Telephone: (303) 861-7000

PETRIE BAUER & VRIESMAN LLP
Scott R. Bauer

/s/ Scott R. Bauer
1601 Emerson Street
Denver, Colorado 80218
Telephone: (303) 863-1260

JACOBS CHASE FRICK
KLEINKOPF & KELLEY LLC
Jeffrey A. Chase
1050 17th street, #1500
Denver, CO 80265
Telephone: (303) 685-4800

Attorneys for Plaintiffs

KIRKLAND & ELLIS
William R. Jentes
James C. Munson
999 18th Street
2540 Denver Place, South Tower
Denver, CO 80202
Telephone: (303) 295-6609
Attorneys for Defendants